

**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER: 06-0326P**

**Penalty**

**For the Period: 2002-2004**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUE**

I. **Tax Administration** – Penalty

**Authority:** IC § 6-8.1-5-1(b); 45 IAC 15-5-3(b); 45 IAC 15-11-2; *Hoogenboom-Nofziger v. State Bd. Of Tax Comm'rs*, 715 N.E.2d 1018 (Ind. Tax Ct. 1999); 45 IAC 15-5-3(b)(7)

The taxpayer protests the assessment of a penalty.

**STATEMENT OF FACTS**

Taxpayer is in the electrical contracting business, doing work in Kentucky and Indiana. Taxpayer was audited and protested the penalty assessment. A hearing was scheduled, but the taxpayer decided not to attend and instead wanted to "have the protest resolved based upon the written information submitted previously." More facts will be provided below.

I. **Tax Administration** – Penalty

**DISCUSSION**

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC § 6-8.1-5-1(b) states in pertinent part:

The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer...." 45 IAC 15-5-3(b). Also of import, although a property tax case, is *Hoogenboom-Nofziger v. State Bd. Of Tax Comm'rs*, 715 N.E.2d 1018, 1024 (Ind.

Tax Ct. 1999), a case in which the Indiana Tax Court explained that, “State Board hearing officers do not have the duty to make a taxpayer’s case.”

The taxpayer protests the imposition of a negligence penalty. The taxpayer states in correspondence to the Department:

[Taxpayer] was incorporated in Kentucky and it’s [sic.] principal shareholder lives in Kentucky. The Company worked exclusively in Kentucky until recent years when one of it’s principal building customers requested the Company begin performing home electrical contracting services in the Evansville area. The Company and it’s shareholder had always filed corporate and individual income tax returns in Kentucky.

Further, the taxpayer states:

Beginning in 2005, the Company and shareholders ... filed Indiana S-Corp and individual income tax returns, after becoming aware of the extent of work in Indiana and consulting with the Company’s CPA.

For the years audited 2002 thru 2004, the Company fully reported 100 [percent] of it’s income to Federal and Kentucky sources. As noted in the Company’s audit report, the Company ... assisted the auditor in going back thru 2002 thru 2004 sales records to determine the extent of work performed in Indiana for those years.

Taxpayer concludes that it believes “there is reasonable cause to protest the penalty assessments” and that it requests abatement.

45 IAC 15-11-2(b) states (in part):

“Negligence” on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer’s carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence.

45 IAC 15-11-2(c) is also of import, and states that the Department “shall waive the negligence penalty ... if the taxpayer affirmatively establishes that the failure ... was due to reasonable cause and not due to negligence.” 45 IAC 15-11-2(c) notes:

In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty....

As stated at the outset, the taxpayer bears the burden of proof. In addition, 45 IAC 15-5-3(b)(7) notes that the “purpose of the hearing is to *clearly* establish the taxpayer’s *specific* objections to the assessment and *reasoning* for these objections.” (*Emphasis added*). The taxpayer asserts

reasonable cause, but it has failed to clearly establish reasonable cause by “demonstrate[ing] that it exercised ordinary business care and prudence” as required by 45 IAC 15-11-2(c).

**FINDING**

The taxpayer’s penalty protest is denied.

DP/BK/DK January 8, 2006